

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM SADOWSKI, ) NO. CV 12-10623-PSG(E)  
Petitioner, )  
v. ) ORDER ACCEPTING FINDINGS,  
RANDY GROUNDS, Warden, ) CONCLUSIONS AND RECOMMENDATIONS OF  
Respondent. ) UNITED STATES MAGISTRATE JUDGE  
\_\_\_\_\_  
)

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. Except as otherwise stated herein, the Court accepts and adopts the Magistrate Judge's Report and Recommendation. As explained below, however, the Court rejects the Report and Recommendation in part, and makes certain additional findings and conclusions:

1. Delete the textual material commencing on page two at line 15 with the word "Therein" and ending on page three, line 22 with the word "reversal."

1       2. At page three, line 25, insert ("the original Petition")  
2 after the date, delete the remainder of that paragraph which commences  
3 at page three, line 25 with the word "Therein" and ends at page 4,  
4 line 2, and insert the following:

5  
6           The original Petition contained the following claims:

7  
8           1. The "overwhelming" presence of uniformed police officers  
9 at trial, and certain actions by the officers, allegedly violated  
10 Petitioner's rights to due process and a fair trial (Claim One);

11  
12           2. Petitioner's trial counsel allegedly rendered  
13 ineffective assistance by: (1) failing to call Petitioner's  
14 treating psychiatrist as a witness; and (2) failing to present  
15 evidence regarding Petitioner's disability payments (Claim Two);

16  
17           3. The prosecutor allegedly committed misconduct during the  
18 guilt phase of Petitioner's trial, by allegedly appealing for  
19 sympathy for the victim's family and by allegedly violating the  
20 "Golden Rule" by asking the jurors to put themselves in the  
21 victim's position; the prosecutor also allegedly committed  
22 misconduct during the sanity phase by misstating the law and the  
23 facts, disparaging defense counsel and vouching for witnesses;  
24 Petitioner's counsel allegedly rendered ineffective assistance by  
25 failing to object to some of the asserted prosecutorial  
26 misconduct; Petitioner's appellate counsel allegedly rendered  
27 ineffective assistance by failing to raise on appeal the alleged  
28 prosecutorial misconduct in assertedly violating the "Golden

1 Rule," vouching and disparaging defense counsel (Claim Three);  
2

3       4. The trial court allegedly violated Petitioner's  
4 constitutional rights to due process and a fair trial by  
5 assertedly failing to give complete instructions at the sanity  
6 phase; Petitioner's trial counsel allegedly rendered ineffective  
7 assistance by failing to object to this alleged instructional  
8 error; Petitioner's appellate counsel allegedly rendered  
9 ineffective assistance by failing to raise the alleged  
10 instructional error on appeal (Claim Four);  
11

12       5. The evidence allegedly was insufficient to support the  
13 jury's finding that Petitioner was sane when he committed the  
14 offenses (Claim Five);  
15

16       6. Petitioner's sentence allegedly violated the Eighth  
17 Amendment (Claim Six); and  
18

19       7. Cumulative error allegedly warrants habeas relief (Claim  
20 Seven).  
21

22       **3. Delete textual material commencing at page four, lines 3-6**  
23 **beginning with "Respondent moved" and ending with "motion to dismiss."**  
24 **Insert the following:**  
25

26           On March 27, 2013, Respondent filed a "Motion to Dismiss  
27 Petition, etc.," contending that the Petition was mixed because  
28 Claims Two, Four, Six and Seven of the Petition allegedly were

1       unexhausted and Claims One and Three allegedly were partially  
2       unexhausted. On April 25, 2013, Petitioner filed an "Opposition  
3       to Respondent's Motion to Dismiss; Motion to Stay and Abey,  
4       etc.," in which Petitioner did not challenge Respondent's  
5       contention that the Petition was mixed.<sup>1</sup> Rather,

6

7       **4. On page four, at line 9, add the following after the citation**  
8       **to Kelly v. Small:**

9

10      *cert. denied, 548 U.S. 1042 (2003), overruled on other grounds,*  
11      *Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007)*

12

13      **5. On page four, at line 16, change "unexhausted" to "exhausted"**

14

15      **6. On page four, at line 17, add the following after the**  
16      **citation to King v. Ryan:**

17

18      *cert. denied, 558 U.S. 887 (2009)*

19

20      **7. On page four, delete the sentence at lines 21-23 beginning**  
21      **with "Accordingly" and insert the following:**

22

23      On October 16, 2013, Petitioner filed a First Amended Petition.

24      ///

25

---

26      <sup>1</sup> Petitioner asserted that "most" of the claims in Claims  
27      One and Three were exhausted and that his Superior Court petition  
28      alleged "the unexhausted claims in Grounds I, II, III, IV, VI and  
      VII" ("Opposition to Respondent's Motion to Dismiss; Motion to  
      Stay and Abey, etc.," p. 7).

1       8. On page four, at lines 26-27, delete "before Petitioner's  
2 federal petition was stayed" and add the following:

3  
4           before this Court stayed the federal Petition and before  
5 Petitioner filed the First Amended Petition

6  
7       9. On page five, at line 19, replace the comma with a period,  
8 delete the remainder of the sentence in lines 19-20, and add:

9  
10          This petition, which contained Petitioner's unexhausted claims,  
11 was denied by the California Supreme Court on May 14, 2014.

12  
13       10. On page five, after the conclusion of the paragraph at lines  
14 21-23, insert the following:

15  
16          The Second Amended Petition asserts the same claims raised  
17 in the original Petition, including Petitioner's newly  
18 exhausted claims.

19  
20       11. On page six, at line two, delete "THE KELLY STAY" and insert  
21 the heading "RELATION BACK"; thereafter insert a new subheading "I.  
22 Governing Legal Standards";

23  
24       12. On page seven, at line 15, insert the following footnote  
25 after "independently timely":

26  
27          Petitioner does not contend, and the record does not show,  
28 that any of Petitioner's newly exhausted claims are

1           independently timely.

2  
3           13. On page seven, at line 17, delete "first amended petition"  
4 and substitute "original Petition" with the following footnote.

5  
6           Because, for reasons discussed in Section III below, the  
7 statute of limitations expired prior to the filing of the First  
8 Amended Petition on October 16, 2013, Petitioner's newly  
9 exhausted claims are timely only if they relate back to exhausted  
10 claims contained in the original Petition.

11  
12          14. On page seven, at line 25, insert the following after the  
13 citation to *Hebner v. McGrath*:

14  
15          cert. denied, 557 U.S. 906 (2009)

16  
17          15. Delete the textual material on pages eight through eleven  
18 and add the following subheading and text:

19  
20          II. Identification of Exhausted Claims in the Original Petition

21  
22          Before discussing the relation back issues, the Court must  
23 determine which claims asserted in the original Petition were  
24 exhausted at the time the original Petition was filed. See *King*  
25 v. *Ryan*, 564 F.3d at 1142 (new claims can only relate back to  
26 claims in the original petition which were exhausted at the time  
27 of filing of that petition).

28          ///

A federal court will not grant a state petitioner's petition for writ of habeas corpus unless it appears that the petitioner has exhausted available state remedies. 28 U.S.C. § 2254(b) - (c); *Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). The exhaustion requirement seeks to avoid "the unseemliness of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *O'Sullivan v. Boerckel*, 526 U.S. at 844-45 (citations, internal brackets and quotations omitted). Exhaustion is considered on a "claim-by-claim" basis. *Insyxiengmay v. Morgan*, 403 F.3d 657, 667 (9th Cir. 2005).

State remedies have not been exhausted unless and until the petitioner's federal claim has been fairly presented to the highest state court. *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979) (citations omitted); see *Castille v. Peoples*, 489 U.S. 346, 350-51 (1989). A claim has not been fairly presented unless the petitioner has described in the state court proceedings both the operative facts and the federal legal theory on which his or her claim is based. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008).

Following the California Court of Appeal's decision affirming Petitioner's conviction and sentence, see *People v. Sadowski*, 2011 WL 2125039 (Cal. App. May 31, 2011), Petitioner filed a petition for review in the California Supreme Court in

1       2011 (see original Petition, p. 3 & attachment).<sup>2</sup> In the 2011  
2 petition for review, Petitioner asserted the following claims:  
3

4           1. Trial for the death of a police officer in a courtroom  
5 "filled with uniformed officers as a substantial spectator  
6 presence" allegedly violated Petitioner's due process right to a  
7 fair trial under the federal and state constitutions; one officer  
8 held a door open for a juror and touched a juror as if to escort  
9 her contributing to a "substantial police presence" which  
10 violated Petitioner's constitutional rights;

11  
12           2. The prosecutor allegedly committed misconduct by:  
13           (a) disparaging defense counsel; (b) misstating the law and the  
14 facts; and (c) appealing to the sympathy of the jury;

15  
16           3. The evidence allegedly was insufficient to show that  
17 Petitioner was sane at the time of the offenses; and

18  
19           4. Petitioner's sentence allegedly violated the California  
20 constitution.

21  
22           Claim One of the original federal Petition was partially  
23 unexhausted. Petitioner exhausted that portion of Claim One  
24 alleging that the presence of uniformed officers in the courtroom  
25 and an officer's act of holding a door for a juror and touching a

---

26  
27           <sup>2</sup> The Court refers to this petition as the "2011 petition  
28 for review" because Petitioner also filed a petition for review  
in the California Supreme Court in 2014 (see Second Amended  
Petition, p. 4).

1 juror as if to escort her assertedly violated Petitioner's  
2 constitutional rights. However, in the original Petition  
3 Petitioner also alleged subclaims that the officers assertedly  
4 stood in the hallway talking within earshot of jurors, stared at  
5 the jury and stood as the jury entered, and that one officer  
6 glared at Petitioner's sister. Petitioner did not present these  
7 subclaims to the California Supreme Court in the 2011 petition  
8 for review. Therefore, these additional subclaims were not  
9 exhausted.

10  
11 Petitioner did not assert his claims of ineffective  
12 assistance of counsel in his 2011 petition for review.  
13 Accordingly, Claim Two of the original Petition was unexhausted.  
14

15 With respect to Claim Three of the original Petition,  
16 Petitioner's 2011 petition for review alleged that the prosecutor  
17 committed misconduct by disparaging defense counsel, misstating  
18 the law and the facts and appealing to the sympathy of the jury  
19 by asking jurors for sympathy for the victim's family while  
20 turning towards the family members. However, the 2011 petition  
21 for review did not allege the subclaim that the prosecutor  
22 violated the "Golden Rule" by asking the jurors to put themselves  
23 in the victim's position. With respect to the subclaim of  
24 alleged prosecutorial vouching, although the 2011 petition for  
25 review did allege that the prosecutor vouched for the credibility  
26 of her contention that Petitioner was not insane and vouched by  
27 describing her personal experience in walking, the 2011 petition  
28 for review did not allege that the prosecutor vouched for

1       witnesses. The 2011 petition for review also did not allege  
2       claims of ineffective assistance of trial or appellate counsel in  
3       connection with the alleged prosecutorial misconduct. Hence,  
4       these subclaims of Claim Three in the original Petition were  
5       unexhausted.

6  
7       In the 2011 petition for review, Petitioner did not allege  
8       any claim of instructional error or ineffective assistance of  
9       counsel in connection with alleged instruction error. Therefore,  
10      Claim Four of the original Petition was unexhausted.

11  
12      The 2011 petition for review contained the same claim of  
13       evidentiary insufficiency asserted in Claim Five of the original  
14       Petition. Consequently, Claim Five of the original Petition was  
15       exhausted.

16  
17      With respect to Claim Six of the original Petition, alleging  
18       an unconstitutional sentence, Petitioner asserted this claim in  
19       his 2011 petition for review only as a claim of state  
20       constitutional error. Because Petitioner did not assert a  
21       federal constitutional challenge to his sentence in his 2011  
22       petition for review, Claim Six of the original Petition was  
23       unexhausted. *See Duncan v. Henry*, 513 U.S. at 365-66 (claim of  
24       error in California Supreme Court petition based solely on state  
25       law did not suffice to exhaust claim that same error violated the  
26       federal constitution).

27      ///

28      Finally, with respect to Claim Seven, Petitioner did not

1 assert any claim of cumulative error in his 2011 petition for  
2 review. Claim Seven of the original Petition was unexhausted.  
3 See Wooten v. Kirkland, 540 F.3d 1019, 1025 (9th Cir. 2008),  
4 cert. dism'd, 555 U.S. 1040 (2008), and cert. denied, 556 U.S.  
5 1285 (2009) ("Wooten did not exhaust his cumulative error claim  
6 in the California Supreme Court by presenting it to the  
7 California Court of Appeal or because it was so 'intertwined'  
8 with his exhausted claims.").

9  
10 In sum, the original Petition contained the following  
11 exhausted Claims:

12  
13 The portion of Claim One alleging that the presence of  
14 uniformed officers in the courtroom and an officer's act of  
15 holding a door for a juror and touching a juror as if to escort  
16 her assertedly violated Petitioner's constitutional rights;

17  
18 The portion of Claim Three alleging the prosecutor committed  
19 misconduct by disparaging defense counsel, misstating the law and  
20 the facts and appealing to the sympathy of the jury by asking  
21 jurors for sympathy for the victim's family while turning towards  
22 the family members; and

23  
24 The challenge to the sufficiency of the evidence alleged in  
25 Claim Five.

26       ///

27       ///

1           **III. Relation Back of Newly Exhausted Claims Contained in the**  
2           **Second Amended Petition**

3  
4           As indicated previously, a claim in an amended petition does  
5           not relate back "when it asserts a new ground for relief  
6           supported by facts that differ in both time and type from those  
7           the original pleading set forth." *Hebner v. McGrath*, 543 F.3d at  
8           1138; *see Mayle v. Felix*, 545 U.S. at 660-61. To relate back,  
9           the facts supporting an unexhausted claim must share a common  
10          core of facts similar in time and type to the facts supporting an  
11          exhausted claim. *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1297  
12          (9th Cir. 2013).

13  
14           **Claim One**

15  
16           Here, the newly exhausted portions of Claim One (that at  
17          trial the spectator police officers assertedly talked within  
18          earshot of jurors, stared at the jury and stood as the jury  
19          entered, and that one officer glared at Petitioner's sister) are  
20          factually similar in time and type to the facts supporting  
21          Petitioner's exhausted claim that the presence of the officers at  
22          trial assertedly denied Petitioner a fair trial. Accordingly,  
23          these claims relate back to the time of filing of the original  
24          Petition.

25          ///

26          ///

27          ///

28          ///

1                   Claim Two

2  
3                   Claim Two, which alleges ineffective assistance of counsel  
4                   in failing to call Petitioner's treating physician and failing to  
5                   present evidence of Petitioner's disability payments, does not  
6                   share a common core of facts similar in time and type to the  
7                   facts of any of Petitioner's exhausted claims contained in the  
8                   original Petition. Claim Two does not relate back to any  
9                   exhausted claim in the original Petition.

10  
11                   Claim Three

12  
13                   With respect to the newly exhausted portions of Claim Three,  
14                   Petitioner's subclaim that the prosecutor allegedly violated the  
15                   "Golden Rule" in closing argument by asking the jurors to put  
16                   themselves in the victim's position is based on facts different  
17                   from those supporting Petitioner's claim that the prosecutor  
18                   assertedly appealed to the sympathy of the jury by asking jurors  
19                   for sympathy for the victim's family. This subclaim does not  
20                   relate back. See *Reiswig v. Fakhoury*, 2013 WL 3779679, \*12 (C.D.  
21                   Cal. July 18, 2013) (new claims of prosecutorial misconduct based  
22                   on facts different from prosecutorial misconduct claims in timely  
23                   petition did not relate back).

24  
25                   With respect to the vouching subclaim contained in Ground  
26                   Three, the exhausted vouching claim in the original Petition  
27                   asserted that the prosecutor vouched for the credibility of her  
28                   contention that Petitioner was not insane and vouched by

1       describing her personal experience in walking. This claim  
2       differs factually from Petitioner's newly exhausted claim that  
3       the prosecutor allegedly vouched for the credibility of  
4       witnesses. *Cf. United States v. Brooks*, 508 F.3d 1205, 1209 (9th  
5       Cir. 2007) (citation and internal quotations omitted) ("Improper  
6       vouching typically occurs in two situations: (1) the prosecutor  
7       places the prestige of the government behind a witness by  
8       expressing his or her personal belief in the veracity of the  
9       witness, or (2) the prosecutor indicates that information not  
10      presented to the jury supports the witness's testimony.").

11  
12           Petitioner's claims of ineffective assistance of counsel  
13       with respect to the subclaims in Ground Three that the prosecutor  
14       allegedly committed misconduct by disparaging defense counsel,  
15       misstating the law and the facts and appealing to the sympathy of  
16       the jury by asking jurors for sympathy for the victim's family  
17       relate back to the corresponding claims of prosecutorial  
18       misconduct alleged in the original Petition. *See Ha Van Nguyen*  
19       *v. Curry*, 736 F.3d at 1297 (claim of ineffective assistance of  
20       appellate counsel in failing to raise double jeopardy claim on  
21       appeal related back to substantive double jeopardy claim).  
22       However, Petitioner's other newly exhausted claims of ineffective  
23       assistance of counsel in connection with alleged prosecutorial  
24       misconduct do not relate back.

25       ///

26       ///

27       ///

28       ///

1           Claim Four

2  
3           Claim Four, alleging instructional error and corresponding  
4           ineffective assistance of counsel, does not relate factually in  
5           time and type to any of Petitioner's exhausted claims contained  
6           in the original Petition. Thus, Claim Four does not relate back.

7  
8           Claim Six

9  
10          Claim Six asserts a federal Eighth Amendment challenge to  
11          Petitioner's sentence based on the same factual allegations  
12          supporting the state constitutional challenge to Petitioner's  
13          sentence contained in the original Petition. As discussed above,  
14          Claim Six in the original Petition was unexhausted because  
15          Petitioner's previous state court challenge to his sentence had  
16          been based solely on state constitutional law. Claim Six in the  
17          Second Amended Petition does not share any "common core of  
18          operative facts" with any of the exhausted claims in the original  
19          Petition. Accordingly, Claim Six does not relate back.

20  
21           Claim Seven

22  
23          Claim Seven, alleging cumulative error, relates back only  
24          insofar as it concerns asserted errors which themselves were  
25          alleged in the original Petition. See *Nordlof v. Clark*, 2010 WL  
26          761294, at \*10 (N.D. Cal. Mar. 3, 2010); *Frazier v. Farmon*, 2007  
27          WL 2019546, at \*25 (E.D. Cal. July 9, 2007).

28          ///

1           In sum, the following newly exhausted claims do not relate  
2 back to the date of filing of the original Petition: (1) Claim  
3 Two; (2) the newly exhausted subclaims contained in Claim Three,  
4 except for Petitioner's claims of ineffective assistance of  
5 counsel with respect to the alleged prosecutorial misconduct  
6 asserted in the original Petition; (3) Claim Four; (4) Claim Six;  
7 and (5) Claim Seven to the extent the alleged cumulative error is  
8 based on newly exhausted claims not alleged in the original  
9 Petition.

10  
11       **16. On page thirteen, at line 3, delete the remainder of the**  
12 **paragraph after the date "June 19, 2014," insert a comma after the**  
13 **date and add the following:**

14  
15       when the Court granted Petitioner's motion for leave to file  
16 the Second Amended Petition. Consequently, absent tolling  
17 or application of an equitable exception, Petitioner's newly  
18 exhausted claims which do not relate back to the time of  
19 filing of a timely petition are barred by the statute of  
20 limitations.

21  
22       **17. On page thirteen, at line 8, insert the following after the**  
23 **citation to *Gaston v. Palmer*:**

24  
25       *modified*, 447 F.3d 1165 (9th Cir. 2006), cert. denied, 549 U.S.  
26 1134 (2007);

27       ///

28       ///

1       18. On page thirteen, at line 12, insert the following after the  
2 citation to *Nino v. Galaza*:

3  
4           *cert. denied*, 529 U.S. 1104 (2000)

5  
6       19. On page thirteen, at lines 13-15, delete the brackets in the  
7 quotation, delete the citation to *Delhomme v. Ramirez* and the  
8 accompanying parenthetical and add the following:

9  
10          *Waldrip v. Hall*, 548 F.3d 729, 733 (9th Cir. 2008) (citation and  
11 internal quotations omitted)

12  
13       20. On page thirteen, at lines 17-18, delete the citations and  
14 add the following:

15  
16          *Id.* at 734

17  
18       21. On page thirteen, at line 28, replace the citation to  
19 *Velasquez v. Kirkland* with:

20  
21          *Velasquez v. Kirkland*, 639 F.3d 964, 967 (9th Cir). *cert. denied*,  
22 132 S. Ct. 554 (2011).

23  
24       22. On page fourteen, at line 11, add the following after the  
25 citation to *Ferguson v. Palmateer*:

26  
27          *cert. denied*, 540 U.S. 924 (2003)

28       ///

1       23. On page fourteen, omit the paragraph at lines 21-22 and add  
2 the following:

3  
4             Because Petitioner is not entitled to statutory tolling  
5 for the period after the Superior Court's August 30, 2013  
6 denial of Petitioner's habeas petition filed in that court,  
7 the limitations period resumed running on August 31, 2013  
8 and expired six days later. Absent equitable tolling or an  
9 equitable exception to the statute of limitations,  
10 Petitioner's newly exhausted claims contained in the Second  
11 Amended Petition which do not relate back to the filing of  
12 the original Petition are untimely.

13  
14       24. On page fifteen, at line 1, delete the period and insert the  
15 following after the citation:

16  
17             *cert. denied*, 537 U.S. 1003 (2002).

18  
19       25. On page fifteen, at line 8, insert the word "allegedly"  
20 before "neglected" and on line 13, insert the word "alleged" before  
21 "failure"

22  
23       26. On page fifteen, at line 24, delete "Applying this test,"  
24 delete "routinely" and capitalize "district"

25  
26       27. On page sixteen, at line 6, delete the words "generally  
27 hold" and substitute "have held"

28       ///

1       28. On page sixteen, at line 15, add the following after the  
2 citation:  
3  
4

4       *adopted*, 2004 WL 1109758 (E.D.Pa. Apr. 30, 2004)  
5  
6

6       29. On page sixteen, at line 20, delete "a minority of courts"  
7 and substitute "some courts"  
8  
9

9       30. On page sixteen, at line 24, insert the following after the  
10 citation to *Coffin v. Cate*:  
11  
12

12       *adopted*, 2013 WL 1314760 (E.D. Cal. Apr. 1, 2013)  
13  
14

14       31. On page sixteen, at line 27, insert the following after the  
15 citation to *Kirk v. Felker*:  
16  
17

17       *adopted*, 2010 WL 2650722 (E.D. Cal. June 30, 2010)  
18  
19

19       32. On page seventeen, at line 3, delete "Indeed, only" and  
20 capitalize "one"  
21  
22

22       33. On page seventeen, delete the sentence beginning at line 27  
23 and continuing on to page eighteen, line two.  
24  
25

25       34. On page eighteen, at lines 14-15, delete the last sentence  
26 of the paragraph.  
27       ///  
28       ///

1       35. On page eighteen, at line 22, insert the following after the  
2 citation:

3  
4       adopted, 2013 WL 1092884 (D. Ariz. Mar. 15, 2013)

5       36. On page nineteen, at line 12, delete the words "either check  
6 the Superior Court's website or"

7  
8       37. Change the citation to *Holland v. Florida* at page nineteen,  
9 line 28 and page twenty, line 1 to "560 U.S. at 651-52"

10  
11       38. Change the citation to *Holland v. Florida* at page 20 line 3  
12 to "560 U.S. at 654"

13  
14       39. On page twenty, at line 9, insert the word "counsel" after  
15 "but"

16  
17       40. On page twenty, at line 10, insert the following after the  
18 citation to *Gibbs v. Legrand*:

19  
20       cert. denied, 135 S. Ct. 1708 (2015)

21  
22       41. On page twenty, delete the sentence at lines 21-22 beginning  
23 with "Accordingly" and substitute the following text and footnote:

24  
25       Accordingly, the Claims identified herein which do not  
26 relate back to the filing of the original Petition are

27       ///

28       ///

1                   untimely.<sup>3</sup>

2

3                  **42. Petitioner's Objections to the Report and Recommendation**

4

5                  Two arguments Petitioner makes in his Objections to the Report  
 6 and Recommendation warrant further discussion. First, Petitioner  
 7 faults the Magistrate Judge who issued the Report and Recommendation  
 8 for stating that Petitioner could have checked the Los Angeles County  
 9 Superior Court's website to determine the status of Petitioner's  
 10 habeas petition ("Objections to the Magistrate Judge's Report and  
 11 Recommendations, etc." ["Objections"], filed April 28, 2015, p. 4).  
 12 Petitioner contends the Los Angeles County Superior Court did not have  
 13 an accessible website until August 13, 2014 (*id.*).

14

15                 Regardless of the alleged inaccessibility of a Superior Court  
 16 website at the time Petitioner's Superior Court petition was pending  
 17 in that court, Petitioner's counsel could have, and should have,  
 18 contacted the Superior Court clerk to determine the status of the  
 19 Superior Court petition before representing to this Court in a sworn  
 20 declaration that "as of November 18, 2013, the matter is still pending  
 21 in the Los Angeles Superior Court and no decision has been rendered."  
 22 Neither Petitioner nor his counsel has provided any satisfactory  
 23 explanation why counsel evidently did not contact the court clerk  
 24 before making this inaccurate factual representation.

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27                 <sup>3</sup> Petitioner does not argue, and the record does not  
 28 support, the applicability of the "actual innocence" equitable  
 exception to the habeas statute of limitations recognized in  
*McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013).

1 Petitioner now asserts that contacting the court clerk was  
 2 somehow not feasible because Petitioner's case assertedly traveled  
 3 through several different courthouses within the Los Angeles County  
 4 Superior Court (see Objections, pp. 4-5). This assertion ignores the  
 5 fact that Petitioner's counsel eventually did learn of the petition's  
 6 denial simply by making a phone call. The alleged lack of  
 7 availability of the Superior Court's website during the "gap" between  
 8 the denial of the Superior Court petition and the filing of the  
 9 California Court of Appeal petition does not excuse counsel's (or  
 10 Petitioner's) lack of diligence in failing to inquire concerning the  
 11 status of the Superior Court petition. Buttressing this conclusion  
 12 are counsel's admitted awareness of the possible unreliability of the  
 13 Superior Court's electronic notification system<sup>4</sup> and the ease with  
 14 which counsel finally made herself aware of the denial of the Superior  
 15 Court petition.

16 ///

17 Second, Petitioner suggests that statutory or equitable tolling  
 18 is warranted because Respondent assertedly failed to notify counsel or

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20 <sup>4</sup> In Petitioner's "Opposition to Respondent's Motion to  
 21 Dismiss; Motion to Stay and Abey, etc.," filed April 25, 2013,  
 22 Petitioner's counsel stated:

23 Although the currently pending state [Superior  
 24 Court] petition has tolled the federal time period  
 25 under 28 U.S.C. §2244(d)(2), Sadowski needs a stay  
 26 because his federal one-year statute will expire six  
 days after the state court rules. Accordingly, once  
 the state court issues a ruling, Sadowski must file his  
 federal petition within six days. Although the state  
court has an electronic notification system, the  
electronic system may not be entirely reliable.

27 ("Opposition to Respondent's Motion to Dismiss; Motion to Stay  
 28 and Abey, etc.," filed April 25, 2013, at p. 11) (emphasis  
 added).

Petitioner, after receiving the November 18, 2013 Status Report, that  
the Los Angeles County Superior Court previously had denied  
Petitioner's state habeas petition. This argument also lacks merit.  
The obligation (as a matter of diligence) to inquire concerning the  
status of Petitioner's Superior Court petition was the obligation of  
Petitioner, not Respondent. Respondent did not mislead Petitioner  
concerning the status of Petitioner's Superior Court petition. There  
is no evidence to support Petitioner's contention that Respondent knew  
that the Superior Court had denied the petition but chose to "lie in  
wait" knowing that Petitioner was unaware of that denial (see  
Objections, p. 11). Consequently, Petitioner's reliance on *Sossa v.*  
*Diaz*, 729 F.3d 1225 (9th Cir. 2013), is misplaced.

#### **43. Recommendation**

The Court declines to adopt the "Recommendation" section (page twenty, line 25 through page 21, line 2) of the Report and Recommendation and issues the following order:

## ORDER

The following Claims contained in the Second Amended Petition are denied and dismissed without leave to amend and with prejudice:

(1) Claim Two; (2) the newly exhausted subclaims contained in Claim Three, except for Petitioner's claims of ineffective assistance of counsel with respect to prosecutorial misconduct alleged in the original Petition; (3) Claim Four; (4) Claim Six; and (5) Claim Seven to the extent the alleged cumulative error is based on newly exhausted

1 claims not alleged in the original Petition.

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3 DATED: June 19, 2015.

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7 PHILIP S. GUTIERREZ  
8 UNITED STATES DISTRICT JUDGE

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